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IN THE

Supreme Court of the United States

..... Term, 1968

No. 419

CHARLES E. HART, Jr.,

Petitioner,

vs.

THE OHIO STATE BAR ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

Supreme Court of the United States

..... Term, 1968

No. .....

CHARLES E. HART, Jr.,

Petitioner,

vs.

THE OHIO STATE BAR ASSOCIATION,

Respondent.

Petitioner herein, Charles E. Hart, Jr., prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered June 26, 1968.

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported as *Ohio State Bar Association v. Hart*, 15 Ohio St. 2d 97.

STATEMENT OF JURISDICTION

The decree of the Supreme Court of Ohio was entered June 26, 1968. Motion for rehearing was denied by entry of the Supreme Court of Ohio dated July 10, 1968. A copy of the opinion rendered by the Supreme Court of Ohio is appended hereto identified as Appendix A. A copy of the decree indefinitely suspending petitioner from the practice of law is appended hereto identified as appendix B. This case came before the Supreme Court of Ohio on Findings of Fact and Recommendations of the Board of Commissioners of the Supreme Court of Ohio which here were certified to the Supreme Court of Ohio on January 11, 1968 and a copy of said Findings and Fact and Recommendations is appended hereto identified as appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3) and this Court's rule 19 (a), inasmuch as the petitioner has been denied due process of law under Amendment XIV to the Constitution of the United States by the application of indefinite, vague and uncertain Canons of Professional Ethics, and by reason of the petitioner being afforded no opportunity to make presentation or being afforded a review before all of the Commissioners who served as fact finders in the case and who reported to the Supreme Court of Ohio.

QUESTIONS PRESENTED

1. When an attorney at law has been convicted of failing to file income tax returns by a Federal Court, may such attorney be subsequently disenfranchised in a state court proceeding by reason solely the application of Canons 29 and 32 of the Canons of Professional Ethics to said conviction when there was no charge or finding that said conviction involved moral turpitude and where said Canons are vague, indefinite and uncertain?

2. Where under Rule of the Supreme Court of Ohio a seventeen (17) member Board of Commissioners is appointed to hear and make findings and recommendations respecting alleged misconduct of attorneys, may such hearing be conducted before only three (3) members when said three (3) members do not report directly to the Supreme Court of Ohio but instead report to the remaining members which do not hear either side of the controversy and which in turn report to the Supreme Court of Ohio?

APPLICABLE CONSTITUTIONAL PROVISIONS, RULE OF COURT, AND CANONS OF PROFESSIONAL ETHICS

This case involves the following:

Constitutional Provision

1. Amendment XIV to the Constitution of the United States more particularly Section 1 thereof, which is appended hereto as Appendix D.

Rule of Court

1. Applicable provisions of Rule XVIII of the Rules of the Supreme Court of Ohio which is appended hereto as Appendix E.

Canons of Professional Ethics

1. Canons 29 and 32 of the Canons of Professional Ethics which are appended hereto as Appendix F.

Statute

1. 26 U.S. Code 7203 which is appended hereto as Appendix G.

STATEMENT OF CASE

The petitioner, Charles E. Hart, Jr., is an attorney at law licensed to practice law in the state of Ohio. On March 10, 1966, an information was filed against petitioner in United States District Court for the Southern District of Ohio, charging that petitioner "did wilfully and knowingly fail to make and file" Federal income tax returns for the years 1960, 1961, and 1962 in violation of Section 7203, Title 26, U.S. Code. To this charge petitioner pleaded nolo contendere and was found guilty with fine of $2,000.00 and sentence of two years imprisonment which was suspended.

Approximately one year later the Ohio Bar Association filed a complaint against petitioner charging the fact of the

conviction, as above and charging that said conviction placed said petitioner in violation of Canons 29 and 32 of the Canons of Professional Ethics.

Pursuant to Rule XVIII of the Rules of the Supreme Court of Ohio the matter then came on to hearing before a panel of three (3) member of the seventeen (17) member Board of Commissioners appointed by the Court. At said hearing the only evidence introduced by the Relator, the Ohio State Bar Association, was the record entries of said conviction in the Federal Court. The petitioner then testified and introduced other testimony and evidence relating to the circumstances of why he did not file and did not feel he had to file income tax returns for the years in question. Additionally, other evidence was introduced by petitioner pertaining to his good character and his good personal and professional reputation.

There was nothing contained in the charges or evidence of Relator, the Ohio State Bar Association, as to any moral turpitude having been involved in connection with said conviction. Further there was nothing in the charges or evidence relating to any aspect of either Canons 29 or 32 of the Canons of Professional Ethics.

Subsequent to the hearing before the three (3) member hearing panel, the full Board of Commissioners reported their Findings of Fact and Recommendations to the Supreme Court of Ohio, there was no hearing before the Board of Commissioners, at least in which the Petitioner was a party.

The matter then came on for hearing before the Supreme Court of Ohio on objections filed by the petitioner herein. The case was submitted on briefs and oral argument and the Court confirmed the findings of the Board that petitioner had violated Canons 29 and 32 of the Canons of Professional Ethics and the Court confirmed the recom-

mendation of the Board that petitioner be indefinitely suspended from the practice of law.

There was no finding by the Board of Commissioners or the Supreme Court of Ohio that there was moral turpitude involved in the circumstances of the failure to file the income tax returns in question.

There was no reference in the Charges, Findings and Recommendations of the Board or in the decision or order of the Supreme Court of Ohio as to how or what portion of Canons 29 and 32 of the Canons of Professional Ethics were deemed applicable.

Motion for rehearing was subsequently denied.

HOW FEDERAL QUESTIONS PRESENTED

Under Rule XVIII of the Rules of the Supreme Court of Ohio, appendix E, the Board of Commissioners provides a hearing panel of three (3) for matters charging an attorney with misconduct. The full Board of Commissioners then subsequently report to the Supreme Court of Ohio with opportunity at this stage for objections to the findings and/or recommendation. It is clear that the Board of Commissioners has not power or authority to invoke penalties of public reprimand, suspension or permanent disbarment.

The federal questions were raised with the Supreme Court of Ohio by timely filing of objections prior to hearing before oral argument. Question 2 pertaining to the commissioners who actually heard the case to the Court was raised by objection No. 5 filed with the Court February 9, 1968 with argument and authorities in support and we quote Objection No. 5 as follows:

> "5. That the entire proceedings before the Panel and under Rule XVIII of the Rules of the Supreme Court of Ohio deprived the Respondent of due process of law and were unconstitutional under the Ohio and

United States Constitutions in that there was an improper delegation of judicial authority."

Feeling that Question No. 1 pertaining to the vagueness and indefiniteness of Canons 29 and 32 might not be considered to be fairly comprised within the objection just recited, Question No. 1 was raised by the timely filing of a Supplemental Objection No. 6 and supporting brief on March 15, 1968 before oral argument to the Supreme Court of Ohio and we quote said objection as follows:

"6. That the Conclusion of said Board that Respondent has violated Canons 29 and 32 of the Canons of Professional Ethics has deprived Respondent of due process of law under Amendment XIV to the Constitution of the United States because said Canons are indefinite, uncertain and vague."

The decision of the Supreme Court of Ohio, appendix A, reflects no consideration to the constitutional questions presented nor does it even acknowledge that said questions were raised and presented.

REASONS WHY THIS WRIT SHOULD BE GRANTED

As to Question 1.

Canons 29 and 32 of the Canons of Professional Ethics are so indefinite, uncertain and vague that their application has deprived petitioner of due process of law under Amendment XIV to the constitution of the United States.

Rule XVIII of the Rules of the Supreme Court of Ohio establishes the disciplinary procedure to be followed in cases involving charges of misconduct against attorneys. Subparagraph (a) titled "Misconduct" defines that term and we quote that definition from said Rule XVIII as follows:

"Misconduct shall mean any violation of any provision of the oath of office taken upon admission to prac-

tice of law in this State, *or any violation of the Canons of Professional Ethics* or the Canons of Judicial Ethics as adopted by the Court from time to time, disobedience of the terms of an order imposing a suspension for an indefinite period from the practice of law, or the Commission or conviction of a crime involving moral turpitude." [Emphasis added]

Petitioner was convicted of violation of Section 7203, Title 26 U.S. Code. The fact of this conviction was the only evidence presented by the Ohio State Bar Association in the disciplinary proceeding under said Rule XVIII. The charges of the Ohio State Bar Association in this case read as follows:

> "That on the tenth day of March 1966, in the United States District Court for the Southern District of Ohio—Western Division, the Respondent, Charles E. Hart, Jr., was convicted of the crime of wilfully and knowingly failing to make and file an income tax return for the years 1960, 1961 and 1962 in violation of Section 7203, Title 18, United States Code; and in violation of Canons 29 and 32 of the Canons of Professional Ethics as adopted by this Court." [By agreed stipulation at trial, Title 26 was substituted for Title 18 of the U.S. Code in the above charge.]

There was no charge, proof or finding by the Supreme Court of Ohio that said conviction was for a crime involving moral turpitude. Thus, on the basis of the record of conviction alone the Board of Commissioners found and the Supreme Court confirmed that this conviction constituted a violation of Canons 29 and 32 of the Canons of Professional Ethics, and without reference to what elements or parts of said Canons petitioner was in violation of.

At this juncture we urge this Court to simply read Canons 29 and 32 of the Canons of Professional Ethics which are set forth in toto in appendix F. The violation of any

of the Canons is now a ground of misconduct under said Rule XVIII.

The language of Canons 29 and 32 is commendable as a statement of goals or objectives. But rather than a definite, certain and specific statement of conduct with prohibitive or required standards, these particular Canons read as would a prefacing or introductory statement to the other Canons which generally are of a considerably more definitive character.

Under the auspices of the Ohio State Bar Association Foundation, Professor Oliver Schroeder, Jr. wrote "Lawyer Discipline: The Ohio Story" published in 1967. At page 17 he discusses the formation of a Committee in 1952 of the Ohio State Bar Association to draft a rule for disbarment procedures. At page 18 Professor Schroeder quotes from the Presidential address to the Ohio State Bar Association relating to the proposed rule in part as follows:

> "Restating in clear and concise terms the standards of conduct — standards as high as we all know they ought to be — required of every member of the Bar, whether he holds judicial office or is engaged in private practice and eliminating in the process all canons of conduct which no one has any intention of enforcing and therefore constitute nothing but *beautiful prattle*;"
>
> [Emphasis added]

Notwithstanding this instruction, all of the Canons including Canons 29 and 32 remain in force and operative today.

In the instant case the Ohio State Bar Association obviously decided that they need not be troubled with any legal or factual question pertaining to whether there was moral turpitude involved in petitioner's federal court conviction for failing to file income tax returns. Rather, they took the easy road and charged a violation of Canons 29 and 32 and the Supreme Court of Ohio found that those Canons were violated by said conviction. The reason Can-

ons 29 and 32 were chosen is clear. Those Canons are so broad and so general and so subject to subjective interpretation that they have become the "catch all" Canons. If an act does not meet the more specific element of the other Canons then the only place to turn is to Canons 29 and 32.

The point in the case at hand is well stated in *United States v. Reese*, 92 U.S. 214 from which we quote from page 22 as follows:

> "It would certainly be dangerous if the legislative could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

The extent that Canons 29 and 32 have been used in disciplinary cases in Ohio as of the writing of "Lawyer Disciplinary: The Ohio Story" is found in the statistical review therein and reveals that of 106 cases, 37 cases involved Canon 29; and 32 cases involved Canon 32. The fish "net" is indeed large and effective. The size and use of the net must now be of grave concern.

This question as to the application of Canons 29 and 32 is an important and substantial question relating to due process of law being afforded all members of the bar. The application of Canons 29 and 32 herein by the Supreme Court of Ohio is analogous to decisions by this Court in declaring statutes or rules unconstitutional and as such is a denial of due process of law which this Court has repeatedly afforded attorneys in disciplinary.

The cases are clear that whether the practice of law is termed a right or a privilege, revocation or disciplinary proceedings must afford due process of law under Amendment XIV to the Constitution of the United States. *Spevack v. Klein*, 1967, 87 S. Ct. 625, 385 U.S. 511. *In re Schlesinger*, 1961, 172 A 2d 835, 404 Pa. 584. *In re Ruffalo*, (1968) 36 Law Week 4284. For review of cases involving "Suspen-

sion or revocation of medical or legal professional license as violating due process—federal cases" see 98 L. Ed 851 annotation where at page 852 we quote:

> "All the cases dealt with herein support (most often inferentially, but nonetheless clearly) the view that due process of law plays a fundamental part in situations involving the suspension or revocation of legal or medical licenses. It is not the issue of whether a lawyer or medical practitioner is entitled to due process under these circumstances that has been the subject of judicial concern, but, instead, whether, as to both matters of substance and matters of procedure, he has, in fact, been afforded such due process."

See also cases relating to admission to the Bar. *Schware v. Board of Bar Examiners of State of N. M.*, 1957, 77 S. Ct. 752, 353 U.S. 232, 64 A.L.R. 2d 288; *Hackin v. Lockwood*, 361 F 2d 499 (1966).

Under the annotation in 98 L. Ed 851, *supra*, section 2 (b), "Vagueness of statutory language", we quote from page 854:

> "If a statute providing for the suspension or revocation of a medical or legal professional license is to meet the test of substantive due process it must be certain in its terms."

More specifically in point is *Czarra v. Board of Medical Supervisors*, 1905, 25 App DC 443, and review of Canons 29 and 32 in light of this decision is invited. There the statute stated as grounds for revocation "Unprofessional or dishonorable conduct." The Syllabus of the Court, particularly numbers 5 through 10 inclusive sets forth clearly and in excellent fashion the Court's reasoning and we quote syllabus 7 and 10 as follows:

> "7. The test to determine whether a statute defining an offense is void for uncertainty is whether the language may apply not only to a particular act about

which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving upon the court the exercise of arbitrary power of discriminating between the several classes of acts."

"10. So much of the act of Congress of June 3, 1896, 29 Stat. at L. 198, chap. 313, as authorizes the board of medical supervisors in this District to revoke the license of a medical practitioner upon conviction of 'unprofessional or dishonorable conduct', independently of other offenses for which a license may be revoked, is void for uncertainty; it being a matter of opinion whether any given act constitutes such conduct; and an order of the board is void which revokes the license of a physician on a complaint charging him with such conduct in that he circulated obscene matter."

The test as to certainty is applied to the statute or in this case Canons 29 and 32, rather than with reference to particular conduct. Thus, the court stated in *Lansetta v. New Jersey*, 1939, 306 U.S. 455 at page 453:

"It is the statute, not the accusation under it that prescribes the rule to govern conduct and warns against transgression."

In the *Lansetta* case the court cited *Connally v. General Construction Co.*, 269 U.S. 385 and quotes from page 391 of the *Connally* case:

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

As to Question 2.

The question here does not relate to the validity of the commissioner system as such. However, under Rule XVIII of the Rules of the Supreme Court of Ohio, in particular paragraphs 10 and 14, the actual hearing is before 3 members of the Board of Commissioners who are charged to hear and take evidence and report to the full Board. The full Board of Commissioners is then charged to review and report to the Supreme Court of Ohio. In short, there is no provision for, nor was there here, any direct reporting by the panel members who heard this case to the Supreme Court of Ohio.

A further detailed look at this procedure reveals that under paragraphs 14 and 15 of said rule, as to penalties of public reprimand and above, the full Board certifies its findings of fact and recommendations to the Supreme Court. This Report has behind it the impetus and weight of the full membership of 17 and said Rule makes no provision for minority opinions. As a matter of fact in "Lawyers Discipline: The Ohio Story", *supra*, at page 136 we quote an interesting feature of the operation of said Rule:

> "On numerous occasions divisions of opinions were expressed orally but the Board abided by the majority vote and a formal dissenting opinion was not produced. In November, 1966, the first formal dissenting opinion in the long history of the Board's recommendation to the Supreme Court occurred."

This is the more interesting considering that there are 17 members of the Board. Their propensity for unanimity certainly exceeds that of any multimember court or quasi-judicial body in our limited experience.

Now, continuing to look at said Rule and its application, there is no provision or opportunity for either side, Relator or Respondent, to make any kind of objection to the report

of the three member panel. There is no provision or opportunity for either side to make any presentation orally or otherwise to the full Board and thus no opportunity to raise questions of law or fact or to in any way point to the deficiencies of the record. Indeed, the report of the Hearing Panel to the Board is not even available for review by either party prior to its submission to the Board.

Thus, the Review called for in said Rule, paragraph 14, is a review without any party representation whatsoever. The result, as in this case, is that Respondent is faced with a recommendation of the full 17 member Board of which 14 did not hear the case and of which 14 heard no presentation by or on behalf of the Respondent. Any presentation was by the three member Hearing Panel.

Further, to the best of our knowledge, there was only one transcript of the proceeding available for the entire Board and much less than 17 briefs that were filed with the Panel for the Board's review. We do not know how much in advance of the Board's meeting for discussion on this case that the Findings and Recommendations of the Hearing Panel were available. However, we do know that the Board met at 1:30 P.M. on December 1, 1967, to consider this case among several others. We know also that the fully prepared, typed and signed Findings and Recommendations of said Board were stamped as being filed on December 1, 1967.

Thus, not only are serious questions raised as to the extent and thoroughness of the Board's review, but as well the total lack of opportunity for Respondent to raise questions at the review stage.

Those cases we are able to find with respect to commissioners' findings involved direct reporting to the court by the commissioner or commissioners who themselves had actually personally heard the evidence and could make first

hand evaluation. Additionally, our study of cases providing for review systematically reveal that throughout our entire judicial system review contemplates representation and presentation at the review stage itself. Our inability to find precedent to the contrary, we believe supports the position taken herein.

The absence of review in the fullest and usual manner and method and the justifiable inference drawn from the record as to the limited extent of review has deprived Respondent of due process of law.

CONCLUSION

This case presents an ideal opportunity for the Court to clarify the question of rights of lawyers in connection with the application of Canons 29 and 32 of the Canons of Professional Ethics and the need for such clarification is, we think, clear from even a casual reading of those Canons. The need for such clarification is demonstrated by the extent of the application of those Canons as herein.

Additionally important questions pertaining to the application of the Ohio disciplinary rule and the failure to provide lawyers with the same constitutional safeguards as others cries out for review.

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APPENDIX "A"

Ohio State Bar Assn. v. Hart, 15 Ohio St. 2d 97.

Attorneys at law — Misconduct — Disciplinary action — Suspension from practice for indefinite period — Acts warranting — Continued failure to file federal income tax returns.

(D. D. No. 86 — Decided , 1968.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

The relator, the Ohio State Bar Association, filed a complaint against the respondent, Charles E. Hart, Jr., charging him with misconduct as an attorney at law in that he was convicted of the crime of wilfully and knowingly failing to file federal income tax returns for the years 1960, 1961 and 1962 in violation of Canons 29 and 32 of the Canons of Professional Ethics.

The Board of Commissioners on Grievances and Discipline recommended that respondent be suspended for an indefinite period from the practice of law.

Mr. James F. Shumaker and *Mr. John R. Welch*, for relator.

Mr. James C. Justice and *Mr. Gordon Bolon*, for respondent.

Per Curiam. On March 10, 1966, an information was filed against respondent in the United States District Court for the Southern District of Ohio, Western Division, charging that respondent "did wilfully and knowingly fail to make and file" federal income tax returns for the calendar years of 1960, 1961 and 1962 in violation of Section 7203, Title 26, U.S. Code. Respondent was charged with having received a gross income of $29,874.70 in 1960, $28,804.28 in 1961 and $36,669.16 in 1962. Section 6012(a)(1), Title 26, U.S. Code, requires an individual having a gross income of

$600 or more for the taxable year to file a federal income tax return.

To this information, respondent entered a plea of *nolo contendere*. Respondent was sentenced to two years imprisonment and was fined $2,000. The sentence of imprisonment was suspended and respondent was placed on probation for two years. The $2,000 fine has been paid.

In defense to the charged misconduct *respondent admits his failure to file the federal income tax returns*, but denies that such conduct violates the Canons of Professional Ethics. Respondent contends that prior to the taxable years in question, he made certain loans totaling $16,700 to a dairy which were not paid, that he decided to write the bad debts off against his taxable income for the years 1960, 1961 and 1962, and that the aggregate of his otherwise net taxable income for those years was less than $16,700. Respondent claims further that he believed that he was under no obligation to file a federal income tax return if his exemptions and deductions exceeded his gross income.

The record indicates that, while respondent did not specialize in the practice of tax law, he had prepared numerous income tax returns for his clients during his professional career and that he was entitled to practice before the Internal Revenue Service.

The evidence supports the charge that respondent violated Canons 29 and 32 of the Canons of Professional Ethics.

The question for determination is whether the discipline of suspension for an indefinite period from the practice of law recommended by the Board of Commissioners on Grievances and Discipline is warranted.

This court in *Cleveland Bar Assn. v. Bilinski* (1964), 177 Ohio St. 43, 201 N.E. 2d 878, and *Dayton Bar Assn. v. Prear* (1964), 175 Ohio St. 543, 196 N.E. 2d 773, held that the con-

tinued and totally unjustified failure of an attorney at law to file income tax returns is sufficient grounds to warrant a suspension for an indefinite period from the practice of law regardless of whether any "moral turpitude" is involved. In light of these authorities, respondent's wholly unwarranted failure to file federal income tax returns for three consecutive years supports the board's recommendation of suspension for an indefinite period from the practice of law.

The case of *Doelker v. Accountancy Bd.* (1967), 12 Ohio St. 2d 76, 232 N.E. 2d 407, relied on by respondent, is not controlling.

The objections to the recommendation of the board are overruled, and the recommendation of the board is confirmed.

Report confirmed and judgment accordingly.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL, SCHNEIDER and BROWN, JJ., concur.

HERBERT, J., dissents because he is of the opinion that a public reprimand would be sufficient.

TAFT, C. J., concurring. The instant case is clearly distinguishable from *Doelker v. Accountancy Board* (1967) 12 Ohio St. 2d 76, 232 N.E. 2d 407. In that case, the only evidence in the record, which is what this court reviewed, was a certified copy of Mrs. Doelker's conviction under Section 7203, Title 26, U.S. Code, of wilfully failing to make an income tax return for one year.

As pointed out in the opinion, she could have been convicted of this crime because she had more than $600 gross income in that year although she had no income tax liability for the year. The majority of this court was of the opinion that the recital of the evidence against Mrs. Doelker in the opinion of the United States Court of Appeals represented at best the hearsay statement of what the record of the

federal court case contained. Neither that record nor the opinion were offered in evidence in the Accountancy Board proceedings against Mrs. Doelker or in the Common Pleas Court appeal therefrom. They were, therefore, not in the record which this court reviewed.

In the instant case, the record discloses charges that Hart had gross income of over $29,000 in 1960, over $28,000 in 1961, and over $36,000 in 1962. His untenable explanation as to why he filed no returns in any one of those three years demonstrates a serious lack of candor. His suggestion of losses of $16,700 in that period does not explain why he failed to file returns. The record evidence indicates a serious effort at tax evasion.

It is stated at page 80 in the opinion of the *Doelker* case: "* * * There is nothing in the record to indicate that her conduct was reprehensible because of repeated failures to file such returns when they should have been filed, as in *Cleveland Bar Association v. Bilinski* (1964), 177 Ohio St. 43, 201 N.E. 2d 878; *Dayton Bar Association v. Prear* (1964), 175 Ohio St. 543, 196 N.E. 2d 773 * * *; or because of any effort to conceal her liability for payment of income taxes * * *."

APPENDIX "B"

THE STATE OF OHIO, } SS
City of Columbus. }

The Supreme Court of the State of Ohio
Of the Term of January, 1968
To-Wit: June 26, 1968

THE OHIO STATE BAR ASSOCIATION,
Relator,

vs.

CHARLES E. HART, JR.,
Respondent.

ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

It appearing to the Court that the Board of Commissioners on Grievances and Discipline filed its Final Report in this Court on January 11, 1968, recommending that the respondent, Charles E. Hart, Jr., should be indefinitely suspended from the practice of law pursuant to Section 6 (b) of Rule XVIII of the Supreme Court of Ohio; and it further appearing that respondent filed objections to the Final Report of the Board of Commissioners on Grievances and Discipline, this cause was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court that the Final Report of the Board of Commissioners on Grievances and Discipline be, and the same hereby is, confirmed and the respondent, Charles E. Hart, Jr., is indefinitely suspended from the practice of law.

The respondent, Charles E. Hart, Jr., is hereby ordered to cease and desist from the practice of law in any form and

is forbidden to appear on behalf of another before any court, judge, commission, board, administrative agency or other public authority. It is further ordered that he be forbidden to counsel or advise, or prepare legal instruments for others or in any manner perform services of any kind for others which would constitute the practice of law. He is also forbidden to hold himself out to another or to the public as being authorized to perform legal services, and he is hereby divested of each, any and all of the rights, privileges and prerogatives customarily accorded to a member in good standing of the legal profession of Ohio.

It is further ordered that the respondent, Charles E. Hart, Jr., surrender his Certificate of Admission to Practice to the Clerk of this Court forthwith and that his name be stricken from the roll of attorneys maintained by this Court.

It is further ordered that the respondent, Charles E. Hart, Jr., pay costs of these proceedings taxed in the amount of Two-hundred sixty dollars and forty-one cents, ($260.41).

It is further ordered that the Clerk of this Court issue certified copies of this entry as provided for in Section 19, Rule XVIII of the Rules of Practice of this Court.

APPROVED: /s/ KINGSLEY TAFT, CHIEF JUSTICE

I, Thomas L. Startzman, Clerk of the Supreme Court of the state of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal 48.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this 26th day of June, 1968.

THOMAS L. STARTZMAN, CLERK
/s/ SAM F. ADKINS, DEPUTY

APPENDIX "C"

BEFORE THE BOARD OF COMMISSIONERS OF GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

Case No. 117

In re:

CHARLES E. HART, JR.,

Respondent,

vs.

OHIO STATE BAR ASSOCIATION,

Relator.

FINDINGS OF FACT AND RECOMMENDATIONS OF THE BOARD

FINDINGS OF FACT

1. Charles E. Hart, Jr. is forty-one years old. He was graduated from Wilmington College and from Salmon P. Chase Law School. He has been practicing in Wilmington since December 1953. He is a member of the Clinton County and Ohio State Bar Associations.

2. On March 10, 1966, an information was filed against respondent in the United States District Court for the Southern District of Ohio charging, in three counts, that respondent "did wilfully and knowingly fail to make and file" Federal income tax returns for the calendar years of 1960, 1961 and 1962, in violation of Section 7203, Title 18, U. S. Code. Respondent was charged with having received a gross income of $29,874.70 in 1960, 28,804.28 in 1961 and 36,669.62 in 1962. To this information; respondent entered a plea of nolo contendere. Respondent was sentenced to two years imprisonment and was fined $2,000. The sentence of imprisonment was suspended and respondent was placed upon probation for two years. The $2,000 fine has been paid.

3. Respondent explained his failure to file income tax returns for 1960, 1961 and 1962, as follows: From 1944 until his admission to the bar, respondent was employed by a small dairy in Wilmington. Following his admission to the bar and continuing until 1959, respondent retained part-time employment at the dairy doing bookkeeping and other administrative work. The dairy did not prosper, and respondent made a series of loans to the dairy as follows:

April 2, 1954, $1,500 (Respondent's Exhibit 1)
October 5, 1955, $7,500 (Respondent's Exhibit 2)
October 15, 1955, $5,000 (Respondent's Exhibit 3)
November 12, 1957, $2,700 (Respondent's Exhibit 4)

These loans were evidenced by promissory notes which were authenticated by Robert H. Carpenter, the dairy president, a witness for respondent. The majority stock interest in the dairy was held by a Cincinnati dairy. In August 1959, the president of the Cincinnati dairy, a Mr. Castleberry, relieved Carpenter and respondent of their duties, took over the operation of the Wilmington dairy and, in due course, dissolved the subsidiary corporation.

Respondent, being unable to collect his notes totaling $16,700 from Castleberry or the parent corporation, chose to write them off against his taxable income for the years 1960, 1961 and 1962. He claims that the aggregate of his otherwise net taxable income for those years, was less than $16,700.

Respondent further claims that he believed that he was under no obligation to file an income tax return if his exemptions and deductions exceeded his gross income.

4. During the eight years between respondent's admission to the bar in 1953 and his first failure to file a tax return for the year 1960, respondent had prepared numerous income tax returns for his clients. Respondent held a

card entitling him to practice before the Internal Revenue Service.

5. Respondent testified that the gross income figures claimed by the Government in the information averaging over $30,000 a year were highly exaggerated and included, at least in part, funds received by respondent for the account of a client loan company.

6. Honorable C. Luther Swaim of the Clinton County Common Pleas Court, Honorable George L. Schilling, Jr., Clinton County Prosecuting Attorney, Honorable Donald Osborn, Clinton County Sheriff, and two private citizens were produced by respondent as character witnesses. They testified that respondent is well regarded in his community.

7. At the close of the hearing, respondent and his attorney promised to submit to the hearing panel at an early date certain records in support of respondent's position. No such records were submitted to the panel in the six months following the hearing.

CONCLUSION

Respondent has violated Sections 29 and 32 of the Canons of Professional Ethics by failing to file Federal income tax returns for the years 1960, 1961 and 1962.

RECOMMENDATION

The Board recommends that respondent be suspended from the practice of law for an indefinite period.

Karl H. Weaner,
Chairman, Board of Commissioners on Grievances and Discipline

William D. Radcliff,
Secretary, Board of Commissioners on Grievances and Discipline

APPENDIX "D"

Amendment XIV

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "G"

26 U.S.C. 7203—Willful failure to file return, supply information or pay tax.

A person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015 or Section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

APPENDIX "E"

RULE XVIII[2]

Disciplinary Procedure

Pursuant to the powers of this Court over the Bar of this State and the members therof, this rule is amended, as follows, effective on March 11, 1964, and shall apply to all pending cases.

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• • • • • • • • • • • • • • •

(5) DEFINITIONS.

(a) MISCONDUCT. Misconduct shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this State, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, disobedience of the terms of an order imposing a suspension for an indefinite period from the practice of law, or the commission or conviction of a crime involving moral turpitude.

• • • • • • • • • • • • • • •

(10) HEARING BY PANEL OF THREE COMMISSIONERS. After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes.

The Chairman of the panel may have a transcript pre-

[2] Same as former Rule XXVII as amended March 11, 1964.

pared of the testimony taken at each such formal hearing, and the cost thereof shall be paid by the Secretary of the Board of Commissioners, or taxed as costs.

• • • • • • • • • • • • • • • •

(13) PUBLIC REPRIMAND; SUSPENSION OR PERMANENT DISBARMENT; DUTY OF PANEL. If the panel finds and determines that the Respondent is guilty of misconduct and that public reprimand, suspension for an indefinite period, or permanent disbarment is merited, the panel shall make its certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board of Commissioners.

(14) REVIEW BY ENTIRE BOARD OF COMMISSIONERS; BOARD TO ADMINISTER PRIVATE REPRIMAND. Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing or may order a further hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is guilty of misconduct. If the Board of Commissioners determines that a private reprimand shall be administered it shall administer such private reprimand. If the complaint is dismissed, or a private reprimand is administered, such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the panel that heard the matter.

(15) PUBLIC REPRIMAND; SUSPENSION OR PERMANENT DISBARMENT; DUTY OF BOARD AFTER REVIEW. If the Board of

Commissioners determines that a public reprimand, suspension for an indefinite period from the practice of law or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of this Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

(16) Show Cause Order Issued by the Court to Respondent. On the filing of such final report of the Board of Commissioners, this Court shall issue to the Respondent an order to show cause why the report of said Board of Commissioners shall not be confirmed and a disciplinary order entered. Notice of the order to show cause shall be served by the Clerk of this Court on the Respondent and all counsel of record, personally or by registered mail.

(17) Response to Order to Show Cause and Objections. The Respondent or Relator within twenty (20) days after the issuance of an order to show cause may file objections to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued and a brief in support of such objections, together with proof of service of copies thereof on the Secretary of the Board of Commissioners and on all counsel of record. All objections and briefs shall be filed in the number and form required by rules of this Court for original actions.

. . . . . .

(19) Review by Court; Reimbursement for Expenses of Board; Duty of Clerk on Entering Order. After hearing on objections, or, if objections are not filed within the prescribed time, this Court shall enter such order as it may find proper, which may include provision for reimbursement of costs and expenses incurred by the Board of Commissioners. Upon the entry of any disciplinary order pursuant to this rule, the Clerk of the Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent (at his last known address), to the Ohio State Bar Association, to the local bar association or associations in the county or counties in which the Respondent resides and maintains his office and the county or counties from which the complaint originated, to the Presiding Judge of the Court of Common Pleas for such county or counties, and to the Presiding Judge of the United States District Courts in Ohio; the United States Court of Appeals for the Sixth Circuit; and to the Supreme Court of the United States.

If a disciplinary order of the Court provides for a public reprimand, the Clerk of this Court shall arrange for publication thereof in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

If a disciplinary order of the Court provides for a permanent disbarment or suspension for an indefinite period from the practice of law, the Clerk of this Court shall arrange for publication thereof in the official reports of this Court, in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

. . . . . .

APPENDIX "F"

Canons of Professional Ethics

"29. Upholding the Honor of the Profession. Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."

"32. The Lawyer's Duty in its Last Analysis. No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a

statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."

SUPREME COURT, U. S.
FILED
SEP 25 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 419

CHARLES E. HART, JR.,
Petitioner,

vs.

THE OHIO STATE BAR ASSOCIATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Disciplinary proceedings in Ohio are under the exclusive jurisdiction of the Ohio Supreme Court.

Pursuant to its Rule XVIII the Ohio Supreme Court, as of January 1, 1957, put the investigation of charges against attorneys in the hands of a Board of Commissioners on Grievances and Discipline consisting of 17 lawyers appointed by the Supreme Court, one from each of 17 districts in the state, each to serve a term of three years. Under the Rule, charges are heard by a panel of three members of the Board, are reviewed by the entire Board of 17 and are then heard on brief and oral argument by the Supreme Court of Ohio.

That is the procedure followed in this case. Rule XVIII is attached hereto as Appendix A. Rule XIX, Rules of Professional Conduct is attached hereto as Appendix B.

Rule XVIII, in addition to providing for the disciplinary procedure to be followed, also defines misconduct. Paragraph (5) (a) states that

> "misconduct shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this State, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, disobedience of the terms of an order imposing a suspension for an indefinite period from the practice of law or the commission or conviction of a crime involving moral turpitude."

Respondent, the Ohio State Bar Association filed a complaint against petitioner, Charles E. Hart, Jr., charging him with misconduct as an attorney at law in that he was convicted of the crime of wilfully and knowingly failing to file federal income tax returns for the years 1960, 1961 and 1962 in violation of Canons 29 and 32 of the Canons of Professional Ethics.

The Supreme Court of Ohio, in its Per Curiam opinion (Petitioner's brief p. 15) found the following to be the facts.

"On March 10, 1966, an information was filed against petitioner in the United States District Court for the Southern District of Ohio, Western Division, charging that he did wilfully and knowingly fail to make and file federal income tax returns for the years 1960, 1961 and 1962 in violation of Section 7203, Title 26, U.S. Code. Petitioner was charged with having received gross income of $29,874.70 in 1960, $28,804.28 in 1961 and $36,669.16 in 1962. Section 6012 (a) (1), Title 26, U.S. Code, requires an in-

dividual having gross income of $600.00 or more for the taxable year to file a federal income tax return.

"To this information petitioner entered a plea of nolo contendere. Petitioner was convicted and sentenced to two years imprisonment and was fined $2,000.00. The sentence of imprisonment was suspended and petitioner was placed on probation for two years. The $2,000.00 fine was paid.

"In defense to the charged misconduct petitioner admitted his failure to file the federal income tax returns but denied that such conduct violates the Canons of Professional Ethics. Petitioner contended that prior to the taxable years in question, he made certain loans totaling $16,700.00 to a dairy which were not paid, that he decided to write the bad debts off against his taxable income for the years 1960, 1961 and 1962, and that the aggregate of his otherwise net taxable income for those years was less than $16,700.00. Petitioner claimed he believed that he was under no obligation to file a federal income tax return if his exemptions and deductions exceeded his gross income.

"The record indicates that, while petitioner did not specialize in the practice of tax law, he had prepared numerous income tax returns for his clients during his professional career and that he was entitled to practice before the Internal Revenue Service.

"The question for determination is whether the discipline of suspension for an indefinite period from the practice of law recommended by the Board of Commissioners on Grievances and Discipline is warranted."

The Supreme Court of Ohio confirmed the recommendation of the Board and held:

"This court in *Cleveland Bar Assn. v. Bilinski* (1964), 177 Ohio St. 43, 201 N.E. 2d 878, and *Dayton Bar Assn. v. Prear* (1964), 175 Ohio St. 543, 196 N.E. 2d 773, held that

the continued and totally unjustified failure of an attorney at law to file income tax returns is sufficient grounds to warrant a suspension for an indefinite period from the practice of law regardless of whether any 'moral turpitude' is involved. In the light of these authorities, respondent's wholly unwarranted failure to file federal income tax returns for three consecutive years supports the board's recommendation of suspension for an indefinite period from the practice of law."

Petitioner contends here that "Canons 29 and 32 of the Canons of Professional Ethics are so indefinite, uncertain and vague that their application has deprived petitioner of due process of law under Amendment XIV to the Constitution of the United States." (Petitioner's brief p. 6)

QUESTIONS PRESENTED

1. When an attorney at law has been convicted of failing to file income tax returns by a Federal Court, may such attorney be subsequently disenfranchised in a state court proceeding by reason solely of the application of Canons 29 and 32 of the Canons of Professional Ethics to said conviction when there was no charge or finding that said conviction involved moral turpitude and where said Canons are vague, indefinite and uncertain?

2. Where under Rule of the Supreme Court of Ohio a seventeen (17) member Board of Commissioners is appointed to hear and make findings and recommendations respecting alleged misconduct of attorneys, may such hearing be conducted before only three (3) members when said three (3) members do not report directly to the Supreme Court of Ohio but instead report to the remaining members which do not hear either side of the controversy and which in turn report to the Supreme Court of Ohio?

ARGUMENT

Petitioner was convicted of a crime and was sentenced to two years imprisonment and fined $2,000.00. The sentence was suspended and he was placed on probation for two years.

He contends here that the Supreme Court of Ohio may not discipline him for misconduct based on a finding that his conduct violated Canons 29 and 32. This contention is somewhat contrary to the petitioner's contention in the proceedings in the court below. Throughout those proceedings petitioner repeatedly suggested and urged that his conduct should merit a reprimand. We quote from his brief filed in the Supreme Court of Ohio:

"Conclusion—On the basis of the circumstances surrounding the Respondent's failure to file income tax returns for which he was convicted and on the basis of his good character, unquestionable competence and excellent reputation in his community where he lives and practices law, we believe and urge that the public interest could be serviced by limiting the discipline to that of reprimand."

At the same time that petitioner was urging the Supreme Court of Ohio to limit the discipline to a reprimand, he also stated to that court: "That the conclusion of said Board that Respondent has violated Canons 29 and 32 of the Canons of Professional Ethics has deprived Respondent of due process of law under Amendment XIV to the Constitution of the United States because said Canons are indefinite, uncertain and vague."

Thus, Petitioner presented the incongruous position to the Supreme Court of Ohio of tacit admission of misconduct as charged, urging that discipline be limited to a reprimand on the one hand, and at the same time arguing that to find

him guilty of misconduct as charged would deprive him of due process of law.

Accordingly, we submit that question number one was not properly presented to the Supreme Court of Ohio for decision and is not properly here.

Petitioner relies on the case of *Czarra v. Board of Medical Supervisors,* (1905) 25 App. D.C. 443. In the *Czarra* case the court held that a statute which authorized the board of medical supervisors to revoke a physician's license for "unprofessional or dishonorable conduct" is void for uncertainty. This view is much in the minority. Federal cases decided since *Czarra* hold that the term "unprofessional conduct" as applied to the conduct of lawyers, physicians and dentists is not unconstitutionally vague. *Brinkley v. Hassig,* (1936 CA 10th Kan.), 83 F. 2d 351; *Phillips v. Ballinger* (1911), 37 App. D. C. 46; *Yoshizawa v. Hewitt* (1931 CA 9th Hawaii), 52 F. 2d 211 (gross carelessness or manifest incapacity not unconstitutionally vague) the view generally expressed by the courts is that these terms are well understood by the courts and by the profession.

This court, in the case of in *Re Secombe* (1836), 15 L ed 565, pointing out that a Minnesota statute prescribing the rule for the removal of attorneys described only in a general way some of the offenses for which attorneys might be removed, said:

"It is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an attorney or counselor ought to be removed. And the legislature, for the most part, can only prescribe general rules and principles to be carried into execution by the court with judicial discretion and justice as cases may arise, * * *"

Reflecting this same principle this court's own Rule 8 provides as one of the grounds for disbarment of an at-

torney "conduct unbecoming a member of the bar of this court."

Of course, in making the determination that the lawyer is guilty of unprofessional conduct, the conduct in question must be such as is generally condemned by all responsible members of the bar. Federal income tax conviction is so recognized by the state courts that have considered the matter.

Over 100 "Income Tax Conviction" cases are collected and annotated in *American Law Reports*, and *Supplement*, 59 ALR 2d 1398-1407. A review of these cases reveals that there is unanimity of opinion among the state courts that federal income tax conviction constitutes unprofessional conduct by a lawyer. The courts consider this proposition so elemental that in most of the cases there is no discussion of the antecedent rule or statute. Rather the discussion in the cases concerns the degree of impropriety inhering in the conduct and the mitigating circumstances in each case.

Each of those cases was considered individually, upon its merits, including mitigating circumstances involved, and the discipline imposed varies accordingly.

The Supreme Court of Ohio defines misconduct or "unprofessional conduct", in pertinent part, as any violation of the Canons of Professional Ethics. "Canons 29 and 32 are broad in their terms. Canon 29 admonishes that an attorney should at all times strive to uphold the honor of the profession. And, although the express admonition of Canon 32 that an attorney must 'observe and advise his client to observe the statute law' is not applicable until the statute has been construed and interpreted by competent adjudication, the validity of the filing requirements of the Internal Revenue Code is not in doubt." *Cleveland Bar Assn. v. Bilinski* (1964), Ohio St. 43, 44, 201 N.E. 2d 878. The

Court has found as a fact that petitioner's conduct violates Canons 29 and 32 and that he is guilty of misconduct. We submit that that decision follows the near unanimous view among the state courts that federal income tax conviction constitutes unprofessional conduct by an attorney at law.

Petitioner also complains, (Petitioner's brief p. 12) that "under Rule XVIII of the Rules of Practice of the Supreme Court of Ohio, in particular paragraphs 10 and 14, the actual hearing is before 3 members of the Board of Commissioners who are charged to hear and take evidence and report to the full Board. The full Board of Commissioners is then charged to review and report to the Supreme Court of Ohio. In short, there is no provision for, nor was there any direct reporting by the panel members who heard this case to the Supreme Court of Ohio."

Petitioner also questions the thoroughness of the full Board's review and complains of a lack of an opportunity to appear before the full Board and, raise questions. (Petitioner's brief, p. 13)

Petitioner contends that the "absence of review in the fullest and usual manner and method and the justifiable inference drawn from the record as to the limited extent of review has deprived Respondent (Petitioner) of due process of law."

The record in this case will show that petitioner filed a brief with the hearing panel which summarized the evidence and presented his position on the evidence. That brief was before the full Board of Commissioners for review.

Due process in disciplinary proceedings requires that the attorney be given notice of the proceeding and an opportunity to defend at a hearing, and that the proceeding be essentially fair.

The proceedings are deemed free of any due process defect, as far as procedure is concerned, if the basic require-

ments of notice and hearing are met; the form of the notice and hearing is immaterial. *Randall v. Brigham*, 7 Wall 523, 19 L ed 285.

We submit that these proceedings before the Supreme Court of Ohio are free from any due process defect. Petitioner was given notice of the charges against him. He was given an opportunity to and did defend himself before the hearing panel of the Board of Commissioners on Grievances and Discipline who received the evidence in this case, presented written and oral argument to that hearing panel, written argument to the full Board of Commissioners, and written and oral argument to the Supreme Court of Ohio stating his objections to the findings and recommendations of the Board of Commissioners. Surely due process does not require more.

CONCLUSION

There is no reason to analyze the law presented by petitioner in support of his Petition for Writ of Certiorari. The petitioner had a full and fair hearing before an impartial tribunal, the Supreme Court of Ohio.

The Ohio State Bar Association respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing brief have been mailed by first class mail with postage prepaid to Attorneys for Petitioner, George E. Tyack, James C. Justice and Gordon Bolon, respectively at their offices.

/s/ SAMUEL T. GAINES
of Counsel for Respondent

APPENDIX A

RULE XVIII[2]

DISCIPLINARY PROCEDURE

Pursuant to the powers of this Court over the Bar of this State and the members thereof, this rule is amended, as follows, effective on March 11, 1964, and shall apply to all pending cases.

(1) Creation of Board of Commissioners on Grievances and Discipline. There is hereby created as Commissioners of this Court a Board of Commissioners on Grievances and Discipline. Said Board of Commissioners shall consist of seventeen (17) members of the Bar of this Court, appointed by this Court. One member of such Board shall be appointed from each of the following districts: *District 1,* comprising Butler, Clermont, Clinton, Hamilton and Warren Counties. *District 2,* comprising Darke, Miami, Montgomery, Preble and Shelby Counties. *District 3,* comprising Defiance, Fulton, Hancock, Henry, Paulding, Putnam, Van Wert, Williams and Wood Counties. *District 4,* comprising Lucas County. *District 5,* comprising Crawford, Delaware, Marion, Morrow, Ottawa, Sandusky, Seneca and Wyandot Counties. *District 6,* comprising Champaign, Clark, Fayette, Greene, Logan, Madison and Union Counties. *District 7,* comprising Franklin County. *District 8,* comprising Adams, Brown, Gallia, Highland, Jackson, Lawrence, Pickaway, Pike, Ross, Scioto and Vinton Counties. *District 9,* comprising Coshocton, Fairfield, Knox, Licking, Muskingum and Perry Counties. *District 10,* comprising Ashland, Erie, Holmes, Huron, Lorain, Medina, Richland and Wayne Counties. *District 11,* comprising Portage and Summit Counties. *District 12,* comprising Cuyahoga County. *District 13,* comprising Ashtabula, Columbiana, Geauga, Lake,

[2] Same as former Rule XXVII as amended March 11, 1964.

Mahoning and Trumbull Counties. *District 14*, comprising Carroll, Stark and Tuscarawas Counties. *District 15*, comprising Belmont, Guernsey, Harrison, Jefferson and Monroe Counties. *District 16*, comprising Allen, Auglaize, Hardin and Mercer Counties. *District 17*, comprising Athens, Hocking, Meigs, Morgan, Noble and Washington Counties. The term of office of each member of said Board of Commissioners shall be three (3) years, beginning on January 1 next following his appointment. Provided, however, that any member of the Board whose term has expired and who shall have an uncompleted assignment as a member of a panel shall continue to serve for the purpose of such assignment until it shall have been concluded before the Board of Commissioners, and further provided that his successor commissioner shall take no part in the proceedings of the Board concerning such assignment. Appointments to terms commencing January 1 of any year shall be made prior to December 1 of the preceding year. Vacancies for any cause shall be forthwith filled by appointment by this Court for the unexpired term. The Court shall each year designate one member as Chairman of said Board of Commissioners, and designate a Secretary, each of whom shall have authority to execute journal entries on behalf of the Board of Commissioners and of panels thereof.

(2) Jurisdiction of Board. The Board of Commissioners is empowered and charged to receive, entertain, inquire into, take evidence, make findings and submit recommendations to this Court, as hereinafter provided,

(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by an attorney and counselor at law, person under suspension for an indefinite period from the practice of law, or judge, or

(b) concerning the mental illness of any attorney and counselor at law or judge, or

(c) relating to petitions for reinstatement as an attorney and counselor of law in this State, or

(d) upon reference by this Court of conduct affecting any proceeding under this rule, where the acts allegedly constitute a contempt of this Court but did not take place in the actual presence thereof, whether by willful disobedience of any order or judgment of this Court or the Board of Commissioners, by interference with any officer of this Court in the prosecution of any duty, or otherwise.

(3) Referral for Investigation. The Board of Commissioners may refer to the Grievance Committee of the appropriate local bar association or to the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association any matters coming to its attention for investigation, as hereinafter provided.

(4) Application of Rule; Authority and Duty of Local Committees. From and after the effective date of this rule, all proceedings with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law and judges; all proceedings for the discipline of such attorneys and counselors at law, persons under suspension for an indefinite period or disbarred from the practice of law, and judges; and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. Any committee authorized by any regularly organized bar association or by the Ohio State Bar Association shall investigate any matter referred to it or which comes to its attention, and may cause a complaint to be filed pursuant to this rule in cases where misconduct, contempt, or mental illness is

found; provided, however, that nothing herein shall affect disciplinary procedures of any regularly organized bar association under the provisions of its constitution not inconsistent with this rule.

The Board of Commissioners or any member thereof, the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, and the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State may call upon any attorney and counselor at law or judge in the State to assist in any investigation or to testify in any hearing before the Board of Commissioners or any panel for which provision is made in this rule, as to any matter as to which he would not be bound to claim privilege as an attorney at law. No such attorney and counselor at law or judge shall neglect or refuse so to assist in any such investigation or so to testify.

(5) **Definitions.**

(a) **Misconduct.** Misconduct shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this State, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, disobedience of the terms of an order imposing a suspension for an indefinite period from the practice of law, or the commission or conviction of a crime involving moral turpitude.

(b) **Mental Illness.** Mental illness shall mean the condition defined in Section 5122.01 (A), Revised Code.

(6) **Manner of Discipline.** Each attorney and counselor at law or judge found guilty of misconduct shall be disciplined. The discipline of such persons shall be

(a) a permanent disbarment from the practice of law, or

(b) suspension for an indefinite period from the practice

of law subject only to reinstatement as hereinafter provided, or

(c) a public reprimand, or

(d) a private reprimand.

(7) Effect of Discipline. A person disbarred shall never thereafter be readmitted to the practice of law in this State. A person who shall have voluntarily surrendered his license to practice and thereafter has been reinstated in the manner hereinafter provided and a person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. A person who has been publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred. depending upon the seriousness of such misconduct.

(8) The Complaint; Where Filed; By Whom Signed. A complaint shall mean a formal written complaint alleging misconduct or mental illness of one who shall be designated as the Respondent. Six (6) copies of all such complaints shall be filed in the office of the Secretary of the Board. Such complaint shall not be accepted for filing unless it is signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted

the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint, and shall constitute the authorization of such counsel to represent said Relator in the premises as fully and completely as if designated and appointed by order of the Supreme Court of Ohio with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved.

(9) Duty of the Board Upon Filing of the Complaint.

(a) Notice to Respondent. The Secretary of the Board of Commissioners shall send a copy of the complaint by registered mail to the Respondent with a notice requiring him to file, within twenty (20) days after the mailing of such notice, six (6) copies of his answer and to serve copies thereof upon counsel of record named in the complaint.

(b) Suspension of Right to Practice Pending Disposition of Misconduct Complaint. After an answer has been filed or the time for answer has elapsed, the Court shall entertain such recommendation as the Board may make for the immediate suspension from the practice of law pending disposition of the complaint if the complaint alleges the conviction of a crime involving moral turpitude supported by a certified copy of the judgment entry of the Court convicting the Respondent.

(c) Mental Illness Suspension. After an answer has been filed or the time for answer has elapsed, if the complaint or answer alleges mental illness supported by a certified copy of a journal entry of a court of competent jurisdiction adjudicating mental illness, or if the Board finds existing mental illness after an examination as provided in (d) hereof, the Board shall forthwith certify the com-

plaint to this Court and the Court may suspend the Respondent from the practice of law.

(d) **Examination.** If the complaint or answer alleges existing mental illness unsupported by a journal entry of a court of competent jurisdiction or mental illness is otherwise placed in issue, the Board or panel may, on its own motion or on motion by either party, order a medical or psychiatric examination of Respondent by one or more physicians, designated by the Board or panel, whose findings shall be presented to the Board or panel as evidence and made available to both parties.

(e) **Termination.** Any suspension under this section may be terminated on Respondent's application to the Board and a showing of removal of the cause for the suspension, which is certified by the Board to, and affirmed by, the Court.

(10) **Hearing by Panel of Three Commissioners.** After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes.

The Chairman of the panel may have a transcript prepared of the testimony taken at each such formal hearing, and the cost thereof shall be paid by the Secretary of the Board of Commissioners, or taxed as costs.

(11) **Dismissal of Complaint.** If the panel finds that the complaint or evidence is insufficient, the panel shall make

its certified report of the proceedings and recommendations to the Board of Commissioners which shall review the proceedings, and shall dismiss the complaint, or refer the matter back to the panel for further hearing or the administering of a private reprimand, or may proceed upon the certified report of the proceedings before the panel. The Secretary of the Board of Commissioners shall give notice of a dismissal to the Respondent, all counsel of record, the Ohio State Bar Association, and the local bar association or associations of the county or counties in which the Respondent resides and maintains his office, and of the county or counties from which the complaint arose.

If a written request for a conference with the Supreme Court of Ohio is made by the Relator within twenty (20) days after the issuance of such notice, Relator, Respondent and a member of the hearing panel will be called to confer with the Court.

(12) Private Reprimand; Duty of Panel. If the panel finds and determines that the Respondent is guilty of misconduct and that private reprimand should be administered, such panel shall administer such reprimand and such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by such panel.

If a written request for a conference with the Supreme Court of Ohio is made by the Relator within twenty (20) days after the issuance of such notice, Relator, Respondent and a member of the hearing panel will be called to confer with the Court.

(13) Public Reprimand; Suspension or Permanent Disbarment; Duty of Panel. If the panel finds and determines that the Respondent is guilty of misconduct and that public reprimand, suspension for an indefinite period, or perma-

nent disbarment is merited, the panel shall make its certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board of Commissioners.

(14) Review by Entire Board of Commissioners; Board to Administer Private Reprimand. Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing or may order a further hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is guilty of misconduct. If the Board of Commissioners determines that a private reprimand shall be administered it shall administer such private reprimand. If the complaint is dismissed, or a private reprimand is administered, such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the panel that heard the matter.

(15) Public Reprimand; Suspension or Permanent Disbarment; Duty of Board After Review. If the Board of Commissioners determines that a public reprimand, suspension for an indefinite period from the practice of law or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection

with such proceedings, in the office of the Clerk of this Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

(16) Show Cause Order Issued by the Court to Respondent. On the filing of such final report of the Board of Commissioners, this Court shall issue to the Respondent an order to show cause why the report of said Board of Commissioners shall not be confirmed and a disciplinary order entered. Notice of the order to show cause shall be served by the Clerk of this Court on the Respondent and all counsel of record, personally or by registered mail.

(17) Response to Order to Show Cause and Objections. The Respondent or Relator within twenty (20) days after the issuance of an order to show cause may file objections to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued, and a brief in support of such objections, together with proof of service of copies thereof on the Secretary of the Board of Commissioners and on all counsel of record. All objections and briefs shall be filed in the number and form required by rules of this Court for original actions.

(18) Answer Briefs. Answer briefs together with proof of service shall be filed within fifteen (15) days after briefs in support of objections have been filed. All briefs shall be filed in the number and form required by rules of this Court for original actions.

(19) Review by Court; Reimbursement for Expenses of Board; Duty of Clerk on Entering Order. After hearing on objections, or, if objections are not filed within the pre-

scribed time, this Court shall enter such order as it may find proper, which may include provision for reimbursement of costs and expenses incurred by the Board of Commissioners. Upon the entry of any disciplinary order pursuant to this rule, the Clerk of the Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent (at his last known address), to the Ohio State Bar Association, to the local bar association or assocations in the county or counties in which the Respondent resides and maintains his office and the county or counties from which the complaint originated, to the Presiding Judge of the Court of Common Pleas for such county or counties, and to the Presiding Judge of the United States District Courts in Ohio; the United States Court of Appeals for the Sixth Circuit; and to the Supreme Court of the United States.

If a disciplinary order of the Court provides for a public reprimand, the Clerk of this Court shall arrange for publication thereof in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

If a disciplinary order of the Court provides for a permanent disbarment or suspension for an indefinite period from the practice of law, the Clerk of this Court shall arrange for publication thereof in the official reports of this Court, in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

(20) **Proceedings Private; Exceptions.** All proceedings and documents relating to complaints and hearings thereon and proceedings in connection therewith shall be private except

(a) Where the Respondent shall request in writing that they be public, or

(b) Where proceedings filed with the Supreme Court of Ohio recommend the discipline of permanent disbarment or suspension for an indefinite period, or

(c) Where any disciplinary matter is heard by the Supreme Court of Ohio, other than in conference, on objections to the findings or recommendations of the Board of Commissioners.

(A copy of the findings, recommendations and actions of the Panel and the Board of Commissioners in each case shall be given to any member of the Court upon request.)

(21) Petition for Reinstatement. No petition for reinstatement to the practice of law shall be entertained by this Court and the same may not be filed in this Court, within a period of two (2) years after the entry of an order suspending for an indefinite period the Petitioner from the practice of law in this State, or within a period of two (2) years after the denial of a petition for reinstatement to the practice of law filed by such Petitioner.

(22) Contents of Petition for Reinstatement. Subject to the foregoing restrictions, any person who has been suspended for an indefinite period from the practice of law and who wishes to be reinstated may file his verified petition and twenty (20) copies thereof with the Clerk of this Court, setting forth

(a) the date when such suspension was ordered, and if there was a reported opinion, the volume and page of the official reports of this Court where such opinion appears;

(b) the dates all such prior petitions for reinstatement were filed, denied or granted;

(c) the names of all persons and organizations, except the Petitioner and the Board of Commissioners, who were, or would be, entitled, under this Rule, to receive from the Clerk of this Court certified copies of the disciplinary order of this Court against Petitioner resulting in his sus-

pension; and the name of the local bar association or associations in the County in which he resides at the time of the filing of the petition and of each County in which he proposes to maintain an office if reinstated; and

(d) the facts upon which he relies to establish by clear and convincing evidence that he possess all the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against him.

(23) Costs to be Deposited with Petition for Reinstatement. Such petition shall be accompanied by a deposit in an amount to be fixed by the Clerk, for probable costs and expenses to be incurred in connection with said proceedings, which shall include any amounts unpaid under any prior order of this Court.

(24) Requisites for Reinstatement. No person shall be reinstated unless he has established by clear and convincing evidence that he possess all the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against the Petitioner. In such case the order of reinstatement may be conditioned upon the Petitioner's subsequently taking and passing a regular bar examination of this Court and thereafter taking the prescribed oath of office.

Paragraphs C and D of Section 6 of Rule XVII shall not apply to any petitioner with respect to whom such an order of reinstatement may have been issued.

(25) Petition for Reinstatement Referred to Board of

Commissioners. Unless denied forthwith for insufficiency in form or substance, the Clerk shall forward five (5) copies of the petition to the Secretary of the Board of Commissioners and such petition shall be deemed to be referred, without court order, to the Board of Commissioners to hold a hearing or hearings, and take and report evidence relevant to the rehabilitation of the Petitioner and his possession of all the qualifications, mental, educational and moral, required of an applicant for admission to the Bar of Ohio at the time of his original admission.

(26) Hearing of Petition by Panel of Three; Hearing Shall Be Public; Who May Appear; Appeal to Court From Denial of Petition by Board of Commissioners. The Chairman of the Board of Commissioners shall appoint a hearing panel of three (3) Commissioners no one of whom shall be a resident of the district in which the Petitioner resides or of the district in which he resided at the time of his suspension and said panel shall conduct a hearing or hearings upon such petition. Reasonable notice of any hearing shall be given to the Petitioner or his counsel and to all persons or organizations referred to in Section (22) (c). Such hearing shall be public. Any interested person, any member of the Bar, and any representative of any local bar association or of the Ohio State Bar Association may appear before the hearing panel in support of or in opposition to the petition.

The hearing panel shall make and certify a report of the proceedings before it, including its findings of fact and recommendations, to the Board of Commissioners; and all proceedings before such panel and the Board of Commissioners shall, whenever appropriate, be governed by the provisions hereinbefore contained governing disciplinary proceedings, including proceedings in this Court or an is-

suance of an order to show cause why the final report of the Board of Commissioners should not be confirmed.

The Board, in its discretion, may recommend that the Petitioner be required to take and pass one of the regular bar examinations as a condition to readmission. If the final report should recommend denial of the petition, the Petitioner shall have ten (10) days from receipt of notice of the date of filing such report to file objections thereto and brief in support thereof.

If the final report should recommend granting of the petition any person or organization referred to in Section (22) (c) shall have ten (10) days from the receipt of notice of filing of such report to file objections to the recommendations and brief in support thereof. The Court shall thereupon enter an appropriate order, which may include such provisions for reimbursement of the costs and expenses incurred in connection with the proceedings as the Court shall deem just.

(27) Manner of Service of Notices, etc. Whenever provision is made for the service of any notice, order, report or other paper or copy thereof upon any Respondent or Petitioner in connection with any proceeding involving a complaint or a petition for reinstatement, service may be made upon counsel of record for such Respondent or Petitioner, either personally or by registered mail.

(28) Quorum of Panel or Board. A majority of the members of the Board of Commissioners or of a hearing panel shall constitute a quorum for all purposes and the action of a majority of those present comprising such quorum shall be the action of the Board of Commissioners or of such hearing panel.

(29) Clerk is Agent for Service of Notices on Non-resident Attorney. Any nonresident of this State, having been

admitted as an attorney and counselor at law by the rules of this Court, or any resident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, who subsequently becomes a nonresident or conceals his whereabouts, by such admission to the practice of law within this State makes the Clerk of this Court his agent for the service of any notice provided for in any proceeding instituted before the Board of Commissioners against such attorney and counselor at law or judge, pursuant to this Rule.

(30) Manner of Service on Clerk; Record of Such Service Not a Public Record. All such notices shall be served by the Secretary of the Board of Commissioners upon the Clerk of this Court by leaving at the office of said Clerk a true and attested copy of such notice and any accompanying document and by sending to the Respondent, by registered mail, postage prepaid, return receipt requested, a like, true and attested copy, with an endorsement thereon of the service upon said Clerk of this Court, addressed to such Respondent at his last known address. The postmaster's receipt for the payment of such registered postage shall be attached to and made a part of the return of service of such notice by the Secretary. The panel or Board of Commissioners or Court before which there is pending any proceeding in which notice has been given as provided in this section may order such continuance as is necessary to afford the Respondent reasonable opportunity to appear and defend. The Clerk of this Court shall keep a record of the day and hour of the service upon him of such notice and any accompanying document, which shall not be a public record in the office of said Clerk.

(31) Power to Issue Subpoenas. In investigations and proceedings under this rule, upon application by the Chair-

man, Vice Chairman, Secretary, or Counsel of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the state authorized to sign a certificate under Section (8) hereof, or by the Respondent or Relator, each member of the Board of Commissioners and its Secretary shall have power to issue subpoenas and to cause testimony to be taken under oath before the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, or any subcommittee thereof, or before the Grievance Committee of any regularly organized local bar association in the State, or before a hearing panel of the Board of Commissioners. All such subpoenas shall be issued in the name and under the seal of this Court and shall be signed by a member of the Board of Commissioners or its Secretary and served as provided by statute.

(32) May Order Depositions. The Secretary of the Board of Commissioners may order testimony of a witness to be taken by deposition within or without this State in the manner prescribed for the taking of depositions in civil actions, and such depositions may be used to the same extent as permitted in civil actions.

(33) Effect of Refusal to Testify. The refusal or neglect of the person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be deemed to be contempt of this Court and shall be punishable accordingly.

(34) Rules of Evidence. All rules of evidence shall be observed in the conduct of all hearings, and the Respondent may be represented by counsel, who shall enter formal appearance.

(35) Docket of Complaints. The Secretary of the Board of Commissioners shall keep a docket of each complaint and of all proceedings thereon, which shall be retained permanently as a part of the records of his office.

(36) Board May Prescribe Rules. The Board of Commissioners may, subject to the prior approval of this Court, adopt other rules and regulations not inconsistent herewith.

(37) Rule to be Liberally Construed. The process and procedure under this Rule and other regulations approved by this Court shall be as summary as reasonably may be. Amendments to any complaint, notice, answer, objections, report or order to show cause may be made at any time prior to final order of the Court. The party affected by such amendment shall be given reasonable opportunity to meet any new matter presented thereby. No investigation or procedure shall be held to be invalid by reason of any non-prejudicial irregularity or for any error not resulting in a miscarriage of justice. This Rule and such regulations relating to investigations and proceedings involving complaints of misconduct and petitions for reinstatement shall be liberally construed for the protection of the public, the Courts and the legal profession and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or subsequent to the amendment of this Rule. To the extent that application of his amended Rule to such pending proceedings may not be practicable, the rules and regulations in force at the time this amended Rule becomes effective shall continue to apply.

APPENDIX B

RULE XIX[3]

RULES OF PROFESSIONAL CONDUCT

Section 1. These rules of professional conduct shall be binding upon all members admitted to practice law in the State of Ohio, and the wilful breach thereof shall be punished by reprimand, by suspension or by disbarment, as provided in Rule XVIII of the Rules of Practice.

The Canons of Professional Ethics and the Canons of Judicial Ethics of the American Bar Association as amended are adopted; and nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof. (The Canons of Professional Ethics were adopted November 13, 1952, and are set forth in 175 Ohio State Reports. The Canons of Judicial Ethics as amended were adopted January 27, 1954, and are set forth in 160 Ohio State Reports.)*

Section 2. An attorney at law shall not advertise or otherwise solicit professional employment. This rule shall not apply to the publication or use of ordinary professional cards or conventional listings in legal directories and newspapers.

Section 3. An attorney at law shall not employ another to solicit or to obtain or remunerate another for soliciting or obtaining professional employment for him.

Section 4. An attorney at law shall not acquire an interest adverse to a client in a subject matter concerning which the attorney has been employed.

Section 5. An attorney at law shall not, directly or indirectly, without the consent of his client, purchase prop-

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[3] Same as former Rule XXVIII.

* Canons of Professional and Judicial Ethics are set forth also in 176 Ohio State Reports.

erty at a probate, foreclosure or judicial sale in an action or proceeding in which he appears as attorney for a party.

Section 6. An attorney at law shall not represent conflicting interests except with the consent of all parties concerned.

Section 7. An attorney at law shall not accept professional employment without first disclosing to his prospective client his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment.

Section 8. An attorney at law shall not accept employment adverse to a client or former client relating to a matter in reference to which he has obtained confidential information by reason of and in the course of his employment by such client or former client.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 17 1968
DAVIS, CLERK

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October Term, 1968

No. 419

CHARLES E. HART, Jr.,

Petitioner,

vs.

THE OHIO STATE BAR ASSOCIATION,

Respondent.

REPLY BRIEF

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Respondent.

REPLY BRIEF

This Reply Brief is filed in order that matters presented in the Argument of Respondent might be clarified.

First, it should be understood that the crime of which Petitioner was convicted was under Section 7203, Title 26, U.S. Code. This was for failure to file income tax returns and *not* for income tax evasion. The Argument of Respondent, is misleading in this connection as they imply that tax evasion was involved which is clearly not the case. Respondent cites 59 ALR 2d 1398-1407 as supporting its argument. However, that annotation and collected cases deals with income tax evasion which is not a question here. We quote from page 1399 the lead paragraph of said annotation which limits the scope of the topic and makes it inapplicable to the case at hand:

"This annotation discusses conviction of an attorney in a federal court for *evasion* of his own personal income taxes as grounds for disbarment or lesser disciplinary by courts of his state." [emphasis added]

Respondent, at page 6 of its Brief in Opposition cites cases dealing with the phrases "unprofessional conduct" and "gross carelessness". Thus in *Yoshizawa v. Hewitt*, 52 F 2d 411, cited by Respondent, the court found that the phrase "gross carelessness" had an established meaning under common law as interpreted in cases. So also in *Brinkley v. Hassig*, 83 F 2d 351, where the court in dealing with the phrase "unprofessional conduct" found from the testimony that the physician in diagnosis and prescribing without adequate information had not met accepted standards of practice. Respondent cites no authority which lends itself to an interpretation or a meaning of the phrase found in Canon 29 that "He should strive at all times to uphold the honor and to maintain the dignity of the profession . . ." Nor have we found authority to assist in interpretation of that language which we submit is so general as to defy interpretation without the establishment of further guidelines.

We have learned that the American Bar Association has recently revised and updated the Canons of Professional Ethics as a result of recommendations of a special committee chaired by former Justice Clark. To this writing we have not found the revised Canons. It may be that they have not yet been formally adopted and so have not been promulgated. It is suggested, however, that the vague, broad and general language found in Canons 29 and 32, here considered, will not be present in the revised Canons.

One further point merits clarification. Petitioner did not urge that his conduct should merit a reprimand as stated

by Respondent as page 5 of its Brief. Petitioner in Brief to the Panel and at Hearing simply urged that if misconduct were found that the discipline be limited to a reprimand. No misconduct was ever admitted, only the fact of the conviction was stipulated and agreed to. Further, Respondent introduced no evidence that said conviction had in fact brought the "profession into disrepute". That was a conclusion made by the Board and confirmed by the court without evidence, as for example testimony of persons who felt the Petitioner had brought the "profession into disrepute".

CONCLUSION

We reiterate, as in the original Petition, that the language of the Canons, rather than the conduct of Petitioner, must be looked to in evaluating the constitutional question in connection with their indefiniteness.

Respectfully submitted,

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